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In the

Supreme Court of the United States

A.A., *et al.*, Individually and as Representatives of a class pursuant to Fed.R.Civ.P. 23(a) and 23(b), *Cross-Petitioners,*

v.

STATE OF NEW JERSEY, *et al.*, *Cross-Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit before Judgment

BRIEF OF THE CROSS-RESPONDENTS IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES. ii

REASONS FOR DENYING THE CROSS-PETITION. . . 1

I. This Court's Review in *Godfrey v. Doe* of Whether the Alaska Sex Offender Registration and Internet Notification Laws Impose Punishment for Purposes of the *Ex Post Facto* Clause Does Not Necessitate, Nor Is Advanced By, Granting *Certiorari* to Review That Same Issue in the Context of New Jersey's Sex Offender Internet Registry Law 1

II. The Salient Jurisdictional Conflict in Informational Privacy Precedent Is with Respect to Whether There Exists a Constitutionally Cognizable Privacy Interest in Avoiding Disclosure of Personal Information, Rather than Whether There Is an Independent Privacy Interest Implicated by the Compilation of Otherwise Public Information 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases Cited:

A.A. v. New Jersey,
176 F.Supp.2d 274 (D.N.J. 2001) 4-5

Cutshall v. Sundquist,
193 F.3d 466 (6th Cir. 1999), *cert. denied*,
529 U.S. 1053 (2000) 7,8

Doe v. Otte, 259 F.3d 979 (9th Cir. 2001),
cert. granted sub nom., Godfrey v. Doe,
122 U.S. 1062 (2002) 1,2,3

Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997),
cert. denied, 522 U.S. 1122 (1998) 5

Doe v. Poritz,
662 A.2d 367 (N.J. 1995) 6

E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997),
cert. denied, 522 U.S. 1109 (1998) 5,6

Hudson v. United States,
522 U.S. 93 (1997) 3

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 4

Paul P. v. Verniero,
170 F.3d 396 (3d Cir. 1999) 7

United States Department of Justice v. Reporters Committee for Freedom of the Press,
489 U.S. 1468 (1989) 6

TABLE OF AUTHORITIES (cont.)

Statutes cited: *Page*

N.J. Stat. Ann. §§ 2C:7-1 to.-11 6

REASONS FOR DENYING THE CROSS-PETITION

I. This Court's Review in *Godfrey v. Doe* of Whether the Alaska Sex Offender Registration and Internet Notification Laws Impose Punishment for Purposes of the *Ex Post Facto* Clause Does Not Necessitate, Nor Is Advanced By, Granting *Certiorari* to Review That Same Issue in the Context of New Jersey's Sex Offender Internet Registry Law.

Measures such as sex offender registry laws are imbued with exceptional importance to our society, at once implicating both public safety concerns over how we can best protect our communities from potentially dangerous sex offenders and constitutional considerations related to the potential application and interpretation of provisions designed to safeguard individual rights. The cross-petitioners and the cross-respondents concur that this Court's grant of *certiorari* in *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001), *cert. granted sub nom.*, *Godfrey v. Doe*, 122 U.S. 1062 (2002) (No. 01-729), evinces a recognition of the grave public importance implicated by the issue of whether the implementation of sex offender community notification through the Internet imposes punishment in violation of the *Ex Post Facto* Clause of the United States Constitution.

The cross-petitioners, noting that their claim that the New Jersey sex offender Internet registry imposes unconstitutional punishment parallels the legal inquiry at issue in *Godfrey v. Doe*, conditionally request this Court's review should it grant New Jersey's petition for *certiorari* before judgment on the question, also arising in the same context of providing public access to information about comparatively dangerous sex offenders through an Internet registry, of whether there is a constitutionally protected privacy interest in avoiding disclosure of a person's home address. Yet, notwithstanding the manifest public importance of the constitutionality of sex offender community notification laws, the cross-petitioners have provided scant justification for this Court to deviate from normal appellate practice to review the decision below

rejecting the contention that retroactive application of New Jersey's sex offender Internet registry law imposes punishment.

At the outset, it should be understood that the court's ruling on the cross-petitioners' punishment claim in *A.A. v. New Jersey* is not inconsistent with Third Circuit precedent, nor does it necessarily conflict with the Ninth Circuit's decision in *Doe v. Otte*. The cross-petitioners concede that New Jersey's sex offender Internet registry law lacks certain features of the Alaska law which led the Ninth Circuit to conclude that Alaska's sex offender registration and Internet registry scheme is punitive. Cross-Pet. at 12-13. Specifically, the cross-petitioners acknowledge that New Jersey, unlike Alaska, does not publish on its Internet registry information concerning an offender's place of employment. The cross-petitioners also admit that, in contrast to Alaska's system in which all sex offenders appear on the Internet registry, New Jersey provides a screening process predicated upon an individualized risk assessment and tiering designation, which also include several specific statutory exceptions, which results in registry publication of only high-risk and certain moderate risk offenders.

Thus, as the cross-petitioners acknowledge, Alaska's sex offender Internet registry law is generally broader in scope, in both the particular information included on the registry and the range of offenders to whom the registry law applies, than the New Jersey law. The Ninth Circuit Court of Appeals in fact relied upon these very facts in discerning a punitive effect based on that court's conclusion, however misguided, that the Alaska Internet registry imposes an affirmative disability or restraint. *Doe v. Otte*, *supra*, 259 F.3d at 988. Focusing on the Alaska registry's applicability to all convicted offenders and the inclusion on the web site of the names and addresses of sex offenders' places of employment, the Ninth Circuit found punitive the Alaska system of sex offender registration and Internet notification, expressly contrasting that system

with those of other states like Tennessee and New York (and, by implication, New Jersey) which limit the particular information disclosed to "the amount deemed necessary to protect the public concerning a specific sexual offender" or which permit disclosure "only on the basis of an individualized assessment of the risk of recidivism[.]" *Ibid.* (internal quotations and citations omitted).

As the cross-petitioners suggest, a holding by this Court that the Alaska law is punitive may or may not dispositively resolve that same issue with respect to the New Jersey law, but such a decision would not necessarily signal a conflict with precedent handed down by either the Third Circuit or the Supreme Court of New Jersey finding that sex offender community notification does not impose punishment within the meaning of the *Ex Post Facto* or Double Jeopardy Clauses, and is likely to provide any further guidance necessary to answer the question with regard to New Jersey's law. It should be understood that, should this Court reverse the Ninth Circuit's decision and hold that Alaska's sex offender Internet registry does not impose unconstitutional punishment, that conclusion would unquestionably apply to New Jersey's somewhat narrower Internet registry law. Thus, despite the clear public interest implicated by the Internet registry, the cross-petitioners' reference to the possibility that this Court's decision in *Godfrey v. Doe* may not definitively resolve the cross-petitioner's similar challenge to New Jersey's sex offender registry law appears to fall short of the requisite showing necessary to justify a grant of *certiorari*.

Similarly, the cross-petitioners' argument that the record assembled in this matter will assist the Court in its consideration of the Alaska law in no way satisfies the requirements of Rule 10 or 11. The cross-petitioners aver that the record assembled with respect to New Jersey's law will be "particularly helpful to the Court" in deciding whether notification imposes an affirmative disability or restraint in the

context of the punishment analysis set forth in *Hudson v. United States*, 522 U.S. 93, 99 (1997), which directs consideration of the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Cross-Pet. at 13-14. This assertion plainly ignores this Court's direction, in considering the *Mendoza-Martinez* factors, to evaluate the purpose and effect of the statute "on its face." *Hudson*, *supra*, 522 U.S. at 100.

This precedent renders inutile the materials the cross-petitioners seek to proffer, which includes "certifications and affidavits describing the effects of community notification on registrants" (cross-pet. at 13) related to third party acts or offenders' own reactions when the community learns of their criminal convictions (but, it should be pointed out, these materials do not actually involve situations where sex offender information was posted on an Internet registry). In considering whether to grant the cross-petitioners' motion for a preliminary injunction, the district court, applying the *Hudson* formulation, held that such unintended secondary repercussions are neither directly imposed nor mandated by the law, concluding that "these 'practical hardships' ... cannot be directly attributed to the operation of statute itself, but are rather, as the Third Circuit observed in *E.B.*, the 'indirect effects' of the disclosure[.]'" *A.A. v. New Jersey*, 176 F.Supp.2d at 290. As summarized by the district court,

> On its face, the statute merely mandates that certain accurate registry information about a subset of Megan's law registrants be made available to the general public via the Internet. Any "punitive effects," such as ostracism or incidents of private violence, are therefore incidental to the legislature's overriding remedial purpose of providing "susceptible members" of the public with the information they need to take precautions to protect themselves and their families and are more directly

> the consequence of the public reaction to the registrant's conviction.

Id., citing *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998), and *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998).

Mirroring the cross-petitioners' unavailing evidentiary argument below, the materials that they assert will aid this Court's consideration generally relate to indirect effects cross-petitioners seek to ascribe to inclusion on the sex offender Internet registry or to sex offender community notification in general. If the *Hudson* inquiry prescribed by this Court is properly limited to consideration of the statute on its face, the proffered materials would provide virtually no assistance in determining whether the sex offender Internet registry laws of New Jersey, Alaska or any other state impose an affirmative disability or restraint within the meaning of the *Hudson* punishment inquiry.

Moreover, based on information and belief, the cross-petitioners will accomplish their goal of placing before this Court the record materials describing effects they seek to attribute to community notification by virtue of an *amicus* submission in support of the respondents in *Godfrey v. Doe*. Consequently, there is no force or validity to any contention that a grant of *certiorari* to review the cross-petitioners' punishment claim with respect to the New Jersey sex offender Internet registry law is justified in order to enable this Court to consider these record materials of arguable relevance, and certainly no basis to conclude that such a contention satisfies the showing required by Rule 10 or 11.

II. The Salient Jurisdictional Conflict in Informational Privacy Precedent Is with Respect to Whether There Exists a Constitutionally Cognizable Privacy Interest in Avoiding Disclosure of Personal Information, Rather than Whether There Is an Independent Privacy Interest Implicated by the Compilation of Otherwise Public Information.

The cross-petitioners also conditionally seek this Court's review of their claim that the State's compilation and disclosure of otherwise public information in a sex offender Internet registry implicates a constitutionally protected privacy interest. Neither the district court in *A.A v. New Jersey* nor the Third Circuit have accepted this proposed constitutional privacy interest in prior Megan's Law-related challenges to New Jersey's sex offender notification laws. It is also axiomatic that the decisions of neither the Supreme Court of New Jersey nor the Sixth Circuit Court of Appeals, which the cross-petitioners cite as the jurisdictional conflict justifying this Court's grant of *certiorari* to review this claim, are controlling in a federal constitutional claim brought before the Third Circuit.[1]

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[1]It should be noted that, although not highlighted by the cross-petitioners as a jurisdictional conflict, the Third Circuit has expressly disavowed the finding of the Supreme Court of New Jersey that the cross-petitioners reference, opining that "[w]e do not agree with the Supreme Court of New Jersey's conclusion in *Doe* that the recognition in *Reporters Committee* of a statutory right to privacy for 'Rap Sheets' under FOIA dictates that a federal Constitutional right to privacy is implicated by notification." *E.B. v. Verniero*, 119 F.3d at 1103, n.23. Moreover, the New Jersey Supreme Court's recognition of a privacy interest in avoiding disclosure of the "totality" of the information compiled and distributed in Megan's Law notices (pursuant to New Jersey's community notification law, N.J. Stat. Ann. §§ 2C:7-1 to -11) would appear to be something of a red herring, considering that the court ultimately found the State's "compelling interest in public disclosure" to substantially outweigh the sex offender's "diminished privacy interest" in the information. *Doe v. Poritz*, 662 A.2d 367, 411-12 (N.J. 1995).

Although not cited in the cross-petition, the Third Circuit has previously refused to accept cross-petitioners' assertion, advanced in prior challenges to New Jersey's sex offender community notification law, that there is a constitutionally cognizable privacy interest implicated through the compilation and assembly of otherwise public information concerning sex offenders. The Third Circuit eschewed the opportunity to recognize the asserted privacy interest, and instead framed the issue as "whether the degree of effort needed to assemble otherwise available but dispersed information ought to be considered as a factor in determining the reasonableness of an individual's expectation of privacy in the compiled data." *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999).[2] This ruling may be contrasted with Sixth Circuit precedent cited by the cross-petitioners, in which that court flatly rejected the notion that the Constitution encompasses a general right to non-disclosure of private information, holding therefore that "[t]he Constitution does not provide [a sex offender] with a right to keep his registry information private[.]" *Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir.), *cert. denied*, 529 U.S. 1053 (1999).

Thus, the cross-respondents agree with the cross-petitioners that the precedent articulated by the Sixth Circuit in *Cutshall v. Sundquist* does indeed signal a split in authority on an issue of great public importance. However, the conflict pertains to the issue of the very existence of a constitutional right to non-disclosure of private information, which divergence is reflected in New Jersey's Petition for *Certiorari* Before Judgment (No. 01-1727, filed May 27, 2002). Pet. at 17-20. Notwithstanding the intimated conflict with the Supreme Court of New Jersey decision in *Doe v. Poritz*, a review of the Sixth Circuit decision in *Cutshall v. Sundquist*

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[2]The Third Circuit ultimately found it unnecessary to decide this specific question in the case before it, based on its finding of a compelling government interest in preventing sex offenses. *See Paul P. v. Verniero*, *supra*, 170 F.3d at 404.

reveals that the circuit court's decision was clearly predicated on a rejection of an asserted constitutionally cognizable privacy interest in personal information in general, rather than any consideration whatsoever of the specific "compilation" interest which the cross-petitioners here assert. *Cutshall v. Sundquist*, *supra*, 193 F.3d at 480-81.

Given the rationale of the Sixth Circuit precedent, it is apparent that the salient issue of divergence between the two cited decisions pertains to the recognition of a constitutionally cognizable privacy interest in avoiding disclosure of personal information (with the element of compilation to be considered, at least according to the Third Circuit precedent applicable to the matter on which *certiorari* is sought, as relevant to the reasonableness of any expectation of privacy in the information at issue). This conflict, which could be fairly characterized as an issue of great public importance, could be resolved if this Court were to grant *certiorari* to review New Jersey's claim related to an informational privacy interest in the non-disclosure of a sex offender's home address. The "compilation" argument advanced by the cross-petitioners might also provide an alternative vehicle for this Court to address the issue of whether there exists a constitutionally cognizable interest in avoiding disclosure of personal information, although it would be less apt because, as the specific nuance of compilation is not necessarily implicated in the Sixth Circuit precedent attests, the asserted jurisdictional split is far less pervasive.

CONCLUSION

For the reasons stated above, the cross-respondents State of New Jersey, Governor of New Jersey James E. McGreevey, Attorney General of New Jersey David Samson, and New Jersey State Police Superintendent Joseph J. Santiago respectfully request that the cross-petition for a writ of *certiorari* be denied.

Respectfully submitted,

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